

## Legal Issues Regarding the Proposed Rules in Alternative Rule No. 2

### House Bill 521 Issues

The proposed standards for EC and SAR in the Department's proposed Alternative Rule No. 2 are intended to "equitably allocate" the "assimilative capacity" of the entire river length. *See* Notice of Hearing for Alternative Rule No. 2, at p. 8-9. The "assimilative capacity" of a river refers to the amount of water in the river that is "higher" quality than necessary to protect the designated uses of the water. Water quality standards that protect the "assimilative capacity" of a stream are more stringent than comparable federal standards or guidelines, because federal guidelines require states to adopt standards that protect the designated "fishable/swimmable" uses of the water, not the assimilative capacity of the water. *See* 40 C.F.R. § 130.3 and § 131.11. If the Board adopts standards that protect the assimilative capacity of a stream, then the Board must also make certain written findings.

Under § 75-5-203(2)(a), MCA, the Board may adopt a rule that is more stringent than a comparable federal guideline, if it makes a written finding that "the proposed state standard or requirement protects public health or the environment of the state..." and that the proposed standard or requirement "can mitigate harm to public health or the environment." The Department interprets this latter provision to require that the proposed standard or requirement provide a greater degree of protection to public health or the environment than the federal regulation or guideline. In addition, under § 75-5-309, MCA, the Board is required to find that, for any rules that are more stringent than federal regulations or guidelines, those rules "...are necessary to protect the public health, beneficial use of water, or the environment of the state." Since the proposed standards are intended to protect the assimilative capacity of a stream rather than protect public health or the environment, the Board could not make the necessary findings required by § 75-5-203, MCA and § 75-5-309, MCA. Consequently, under the Department's interpretation, the Board could not adopt the proposed standards in Alternative Rule No. 2 that are more stringent than comparable federal regulations.

Finally, the Department believes that adopting water quality standards to protect the assimilative capacity of a water body is likely beyond the authority of the Board to adopt standards that protect the beneficial uses of the water. *See* § 75-5-301(1), MCA.